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Sovereign Immunity and Public Debt

In addition to the risks inherent to all transnational lending operations, loans made to foreign sovereigns and other public entities involve the risk that the borrower may not be amenable to suit and that, even if jurisdiction can be obtained over it, there may be no effective way of enforcing a creditor judgment against the borrower's property. Immunity from suit and from execution are two facets of a specter that no prudent lender can ignore.

Recent developments in the law of sovereign immunity are of direct interest to lenders. The restrictive doctrine of immunity has gained acceptance not only in treaty law, such as the European Convention on State Immunity,[1] and domestic statutes in such countries as the United States,[2] the United Kingdom,[3] Canada,[4] Australia,[5] Singapore,[6] Pakistan,[7] and South Africa,[8] but also in contemporary judicial decisions in countries, such as Continental Europe, whose rules of immunity remain uncodified.[9]

Since the majority of these countries include those in which most transnational loans are made and are to be repaid, these developments would appear

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1. European Convention on State Immunity of May 16, 1972, *reprinted in* 11 I.L.M. 470 (1972); 3 G.R. DELAUME TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES app. I, Booklet D, at 3 (Mar. 1988).

2. 28 U.S.C. §§ 1330, 1332 (a)(2)–(4), 1391(f), 1441(d), 1602–1611 (1982), *reprinted in* 15 I.L.M. 1388 (1976) (amended in 1988; *see* 134 CONG. REC. S17209 (daily ed. Oct. 21, 1988)); G.R. DELAUME, *supra* note 1, at 67.

3. State Immunity Act 1978, *reprinted in* 17 I.L.M. 1123 (1978); G.R. DELAUME, *supra* note 1, at 51.

4. State Immunity Act 1982, *reprinted in* 21 I.L.M. 798 (1982); G.R. DELAUME, *supra* note 1, at 75.

5. Foreign States Immunity Act 1985, *reprinted in* 25 I.L.M. 715 (1986); G. R. DELAUME, *supra* note 1, at 83.

6. *See Materials on Jurisdictional Immunities of States and their Property,* U.N. LEG. SER., U.N. Doc. ST/LEG/SER.B/20/1982.

7. *Id.*

8. *Id.*

9. 2 G.R. DELAUME, *supra* note 1, chs. XI, XII (Oct. 1986); C. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS (1988).

encouraging to lenders. Nevertheless, lenders should not relax their vigilance. On the contrary, there are a number of reasons why lenders should continue to give due attention to issues of immunity in making loans to foreign sovereigns. In the first place, certain countries, including socialist countries, continue, at least in principle, if not always in practice, to adhere to the absolute doctrine of immunity.[10] In the second place, the rules prevailing in those countries that favor the restrictive doctrine are not always coterminous and divergences among them make it difficult to anticipate the outcome of suits brought against foreign sovereigns or of measure of execution against State property. So much the more, since the implementation of immunity rules, even in countries whose law is codified, depends to a large extent upon judicial determination and there is no assurance that, between the signing of the loan and the time at which judicial action or execution may prove necessary, no change will occur in the content of the relevant rules of immunity. In fact, recent developments show that these rules are the object of constant judicial reappraisal and there is no reason to expect this situation to change in the foreseeable future.

Under the circumstances, lenders would be well advised to attempt to solve immunity issues at the outset by means of appropriate stipulations in the form of express waivers of immunity. The frequency of such waivers in transnational loan contracts shows that lenders are aware of the usefulness of these provisions.

Clearly, an exhaustive discussion of the subject would exceed the scope of this article. This discussion is, therefore, limited to identifying certain current developments that show the dynamic character of immunity rules (Section I) and the response of the draftsman in quest of "immunity avoidance" (Section II).

I. Immunity Rules in Motion

The restrictive doctrine of immunity is based on the fundamental consideration that immunity should be denied to foreign States engaged in commercial activities (*jure gestionis*) as opposed to those carried out in their sovereign capacity (*jure imperii*). Before lenders can avail themselves of the benefit of treaty or domestic rules acknowledging the restrictive doctrine, they must, therefore, overcome a threshold issue of characterization, namely whether the foreign borrowings made by States should be regarded as commercial or sovereign acts. This issue is one that is not finally settled and deserves consideration. In addition to this basic issue, lenders must be aware that certain countries limit the application of the restrictive doctrine of immunity in several ways, for example by requiring a nexus between the

10. *See, e.g.*, Osakwe, *A Soviet Perspective on Sovereign Immunity: Law and Practice*, 23 VA. J. INT'L L. 13 (1982); *People's Republic of China: Aide Mémoire of the Ministry of Foreign Affairs, February 3, 1983*, 22 I.L.M. 81 (1983). *See also infra* note 20 and accompanying text.

transaction and the forum in which action is brought or execution pursued (the territorial connection) or by limiting execution against the borrower's assets to those assets intimately linked to the transaction (the functional connection). Equally important is the question of the timely availability of the remedies sought by lenders. In some countries, pre-judgment attachment against State property is forbidden and execution can be obtained only after recovery of judgment. This question of "timing" is obviously of direct concern to lenders.

A. The Basic Issue of Characterization

There is no final answer to the nature of the foreign borrowings made by States, their political subdivisions, agencies, or instrumentalities. All that can be said is that the commercial characterization is gaining importance in an increasing number of countries.

The clearest example of this modern trend is found in the State Immunity Act (SIA) of the United Kingdom, which includes in the definition of "commercial transactions": "any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or any other financial obligation."[11]

This definition is substantially found also in the Australian Foreign States Immunity Act (Australian FSIA).[12] It is broad enough to cover not only direct loans but also borrowings in the form of securities issued in the market, commercial credits, and guarantees related to any of these transactions.

The Foreign Sovereign Immunities Act (FSIA) of the United States contain no mention of "public debt" as a separate category of state transactions. Earlier bills made a distinction between the public debt of foreign sovereigns with regard to which the borrower would have been entitled to immunity in the absence of an express waiver; and the debt of other public entities, which would have been considered as commercial transactions.[13] The relevant provision was deleted. The section-by-section analysis of the FSIA[14] implies that the "borrowing of money" by foreign States would be considered as a commercial transaction. A proposed amendment to the FSIA would have substantially endorsed the definition found in the British SIA, but so far, it has failed to be implemented.[15] The response of U.S. courts has generally favored the commercial characterization, but, for a number of reasons, the courts found ways to dismiss the actions

11. State Immunity Act 1978, *supra* note 5, § 3(3)(b).

12. Foreign States Immunity Act 1985, *supra* note 5, § 11(3). The Canadian State Immunity Act contains no provision on the subject. State Immunity Act 1982, *supra* note 4.

13. 2 G.R. Delaume, *supra* note 1, ch. XI, ¶ 11.06 (Oct. 1986).

14. 15 I.L.M. 102, 105 (1976).

15. *See* Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 Rec. Cours, Hague Acad. 235, 310 (1986).

brought against foreign sovereigns. This has been the case in *Allied Bank International v. Banco Credito Agricola de Cartago,*[16] *Braka v. Bancomer,*[17] and *Callejo v. Bancomer,*[18] in which the courts, although they favored the commercial characterization, ultimately based their decisions on considerations pertinent to the application or nonapplication of the act of state doctrine.[19] In *Jackson v. People's Republic of China*[20] the court first adopted the commercial characterization, but had second thoughts on the subject and ultimately dismissed the action on the ground that the FSIA was not intended to apply retrospectively to borrowings made in the United States several decades earlier by another Chinese Government. Similar decisions have been rendered in decisions concerning actions brought against Poland[21] and the USSR.[22]

The situation in countries whose law is not codified is also fluid. Thus, the commercial characterization has prevailed in Belgium[23] and in Switzerland.[24] In France it has been held that the guarantee given by Turkey to bonds issued by the City of Constantinople should be regarded as partaking of the commercial nature of the City's borrowings and that neither the City nor the guarantor could claim immunity.[25] In the absence of cases clearly in point, however, it is not certain

16. 566 F. Supp. 1440 (S.D.N.Y. 1983), *aff'd,* 733 F.2d 23 (2d Cir. 1984), *vacated and rev'd on rehearing,* 757 F.2d 516 (2d Cir. 1985).

17. 762 F.2d 222 (2d Cir. 1985), *reprinted in* 24 I.L.M. 1047 (1985).

18. 764 F.2d 1101 (5th Cir. 1985), *reprinted in* 24 I.L.M. 1050 (1985).

19. Not the least surprising feature of these decisions is that none of them seriously discusses the possible relevance of article VIII, section 2(b) of the IMF Articles of Agreement to the solution of the problem before them. *See* 3 (J. GOLD, THE FUND AGREEMENT IN THE COURTS 155–66, 417–35 (1986); Zamora, *Recognition of Foreign Exchange Controls in International Creditors' Rights Cases: The State of the Art,* 21 INT'L LAW. 1055 (1987).

20. 550 F. Supp. 869 (N.D. Ala. 1982), *reprinted in* 22 I.L.M. 75 (1983), *set aside,* 596 F. Supp. 386 (N.D. Ala. 1984), *reprinted in* 23 I.L.M. 402 (1984), *aff'd,* 794 F.2d 1490 (11th Cir. 1986), *reh'g denied,* 801 F.2d 404 (11th Cir. 1986), *cert. denied,* 107 S. Ct. 1371 (1987). *See* 2 G.R. DELAUME, *supra* note 1, ch. XI, ¶ 11.06 (Oct. 1986).

21. Schmidt v. Polish People's Republic, 742 F.2d 67 (2d Cir. 1984).

22. Carl Marks & Co. v. Union of Soviet Socialist Republics, 841 F.2d 26 (2d Cir. 1988); *see also* Note, *Retroactive Application of the Foreign Sovereign Immunities Act: A Due Process Analysis,* 19 GEO. WASH. J. INT'L L. & Econ. 871 (1985).

23. Judgment of May 24, 1933, Court of Cassation [Cass.] Mahieu, 62 J. DU DROIT INT'L [CLUNET] 1034 (1935).

24. Judgment of Mar. 18, 1930, Swiss Federal Tribunal (République Hellénique v. Walder), RECUEIL OFFICIEL DES ARRÊTS DU TRIBUNAL FÉDÉRAL [R.O.] 56. I. 237; Judgment of June 6, 1956, T.F., R.O. 85. I. 75 (Royaume de Grèce v. Banque Julius Bär et Cie.), 1956 INT'L L. REP.; Judgment of Oct. 7, 1938, T.F. (État Yugoslave v. S.A. Sogerfin), LA SEMAINE JURIDIQUE JUDICIAIRE 327 (1939). Note, however, that in the *République Hellénique* and the *Bär* cases, the action was dismissed on the ground that the transaction did not bear a territorial nexus with Switzerland. *See infra* note 28 and accompanying text.

25. Judgment of Feb. 10, 1965, Court of Appeal of Rouen (Société Bauer-Marchal v. Ministre des Finance Turquie), 92 CLUNET 655 (1965); Judgment of Dec. 19, 1961, [Cass.] 1962 JURIS-CLASSEUR PÉRIODIQUE [J.C.P.] (in the same case) II. 12489; Judgment of Jan. 29, 1957, Quashling Paris, 84 CLUNET 392 (1957).

that the same characterization would apply to loans contracted for its own account by a foreign State.[26]

In order to avoid these uncertainties, it is understandable that lenders sometimes insist upon providing expressly in the loan documents that: "The borrowings (guarantees) hereunder shall be private and commercial acts and shall not be regarded as governmental or public acts."

Such a contractual characterization might go a long way in winning a court's favor. By going to the root of the matter, such a stipulation would make it difficult for: (i) the borrower to reopen at the time of the proceedings an issue of definition to which he had already agreed and (ii) the court to substitute its own characterization for that adopted by the parties.[27]

B. A Matter of Connections

1. *The Territorial Connection*

Even if lenders successfully overcome the characterization issue, they should be aware that other obstacles may lie in their path. Certain legal systems limit the application of the restrictive doctrine of immunity to loans contracted or repayable in the forum's territory, as opposed to entirely foreign transactions. Such is the case in Switzerland. Although the Swiss courts consider that the borrowings of a foreign sovereign are commercial acts, as to which the borrower can claim no immunity, they apply this rule only to transactions having some connection with the Swiss territory, for example, the place of issue or the place of payment. In the absence of such a connection, the Swiss courts decline jurisdiction and refuse to permit execution against the assets of a foreign State.[28]

A similar territorial limitation appears in the FSIA since the Act applies only to commercial acts "carried on in the United States" or having a "substantial

26. Two decisions of the Court of Cassation are inconclusive in the sense that one dealt with issues of assumption of debt pursuant to peace treaties (Judgment of Oct. 5, 1965, Cass. 1966 (Faure et al. v. État Italien), J.C.P. II. 14831) and the other with succession to debt between Belgium and the (then) Colony of the Congo (Judgment of Nov. 21, 1961, Cass. 1962 (Montefiore v. Association Nationale des Porteurs de Valeurs Mobilières), J.C.P. II. 12521). The *Eurodif* case, Judgment of Mar. 14, 1984, Cass. (Société Eurodif v. République Islamique d'Iran), 111 Clunet 598 (1984) is also not conclusive since it involved a loan made by Iran rather than a borrowing contracted by that State; *see infra* note 35 and accompanying text.

27. *See* Morgan Guaranty Trust Co. v. Republic of Palau, 657 F. Supp. 1475 (S.D.N.Y. 1987), in which a guarantee agreement between private banks and the Republic provided that: "[T]he execution and delivery of and the performance of its obligations under this Agreement by Palau constitute private and commercial acts done for private and commercial purposes." (Citation omitted.) *See also* in the same case, 680 F. Supp. 99 (S.D.N.Y. 1988).

28. Judgment of June 6, 1956, T.F., R.O. 85.I.75, 1956 Int'l L. Rep. 195; Judgment of Mar. 18, 1930, T.F., R.O. 56.I.237. 20 I.L.M. 151 (1981) (*see supra* note 24), Judgment of June 19, 1980, T.F. (Socialist Libyan Arab Popular Jamahiriya v. Libyan American Oil Co. (LIAMCO), 20 I.L.M. 151 (1981), 1983 Revue de L'Arbitrage 113; *see also* Lalive, *Swiss Law and Practice in Relation to Measures of Execution Against the Property of a Foreign State*, 10 Neth. Y.B. Int'l L. 153 (1979).

contact'' with the United States.[29] As a result of this territorial test, which has become relevant also in the context of the act of state doctrine,[30] a foreign State may be entitled to plead immunity in regard to borrowings made outside the United States.

The European Convention on State Immunity leads to similar conclusions. The Convention does not specifically refer to loans or other financial transactions. However, these clearly fall within the scope of contracts referred to in article 4 of the Convention, which ''fall to be discharged in the territory of the State of the forum.''[31] The nonimmunity rule set forth in this provision is, therefore, confined within narrow geographical limits. It applies only when the forum State is also the State in which the transaction is to be performed, for example where payment of interest and repayment of principal is to be made.

In contrast, section 3(3)(b) of the SIA[32] makes no mention of a territorial link between the financial transaction involved and the United Kingdom. As a result, the nonimmunity rule applies to any financial transaction of a foreign State, whether contracted in or outside the United Kingdom. Following the decision of the House of Lords in the *Alcom* case,[33] however, it is to be feared that the practical significance of the SIA may be confined to immunity from suit, as distinguished from immunity from execution, since in regard to execution the lenders may be deprived of an effective remedy unless the property sought to be attached has been clearly earmarked by the borrower as ''commercial'' property.

2. *The Functional Connection*

Comparative analysis shows that about the only generally accepted immunity rule is that when immunity from execution does not exist only the commercial assets of a foreign State can be subject to execution.[34] In other respects, the rules in existence exhibit significant variations.

29. 28 U.S.C. § 1603(e) (1982).

30. *See supra* notes 16–18 and accompanying text.

31. European Convention on State Immunity, *supra* note 1, art. 4.

32. *See supra* note 11 and accompanying text. As to Australia, see *supra* note 12.

33. *See infra* note 42 and accompanying text.

34. In general terms, it can be stated that public entities other than States enjoy no immunity from execution unless it is established that the entity involved manages, on behalf of its own government, State assets that are intended for use in connection with governmental activities. This is particularly, though not exclusively, the case of central banks. *See* 2 G.R. DELAUME, *supra* note 1, ch. XII, ¶ 12.02 (Oct. 1986). Conversely, in the absence of exceptional circumstances, (*cf.* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591 (1983), *reprinted in* 22 I.L.M. 840 (1983)), the separate personality of public entities is usually respected and attempts to execute against their own assets decisions rendered against a debtor state have generally failed. *See* in France, Judgment of July 21, 1987, Cass. (Société Ltd. Benvenutti [should read Benvenuti] et Bonfant v. Banque Commerciale Congolaise), 115 CLUNET 108 (1988); and in the United States, Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2656 (1985); Hercaire Int'l Inc. v. Argentina, 821 F.2d 559 (11th Cir. 1987). *But see* in Switzerland, Judgment of Apr. 24, 1985, T.F. Switz. (Socialistische Libysche Arabishe Volks-Jamahirya v. Actimon S.A.), 108 LA SEMAINE JUDICIAIRE 33 (1986).

Thus, certain legal systems restrict the availability of property subject to execution by requiring that such property be used or intended to be used for the purposes of the transaction, for example a loan, out of which the claim arises. This is the case under section 1610(a)(2) of the FSIA in regard to post-judgment measures of execution,[35] and in France in regard to both pre-judgment attachment and post-judgment execution.[36] Under the circumstances, lenders must realize that they may not find in the United States or France relief against the property of a foreign sovereign borrower unless it is established that the property in question is used or intended to be used for the purposes of the loan.

The limitative character of this rule may entail serious consequences. The link required between the lenders' claim and the property subject to execution would seem to restrict possible measures of execution to monies earmarked for loan service purposes. Clearly, in the event of a default, these monies are unlikely to be present, at least in sufficient quantity, to satisfy the lenders' claim. Unable for practical reasons to levy effective execution on funds intended for loan service, the lenders would also be legally barred from attaching any monies used by the borrower in connection with other commercial operations because these monies would bear no relation to the loan. Furthermore, the nexus requirement raises another practical problem, namely that of determining who should have the burden of proving not only the commercial character of the property subject to execution but also the nexus between that property and the loan. Should the burden fall on the lenders or should it be the responsibility of the borrowing State to establish that the loan transaction is a sovereign act or that, if the loan is characterized as a commercial act, the property involved is used for purposes other than the servicing of the debt? This question is one that the FSIA does not solve and that has been the object of two contrary decisions by U.S. courts. In both cases, the claimant sought to enforce an award by execution upon the accounts of the debtor State's embassy in Washington, D.C. These accounts were used in part for commercial expenditures and in part for diplomatic functions. In one case, the court upheld the attachment on the ground that to hold otherwise would create a loophole in the FSIA by removing mixed accounts from the reach of the State's creditors.[37] In the other case, the court held to the contrary that the fact that the account was used incidentally for commercial purpose "would not cause the entire account to lose its mantle of immunity."[38]

35. The nexus requirement has been removed by the 1988 amendment of the FSIA in regard to execution of arbitral awards. *See infra* note 43 and accompanying text.

36. Judgment of Mar. 14, 1984 Cass. (Société Eurodif v. République Islamic d'Iran), 111 CLUNET 598 (1984); 73 REVUE CRITIQUE DE DROIT INT'L PRIVÉ [REV. CRIT. DR. INT. PR.] 644 (1984), *translated in* 23 I.L.M. 1062 (1984); *see* G.R. Delaume, *Recent French Cases on Sovereign Immunity and Economic Development*, 2 ICSID REV.-FILJ 152 (1987).

37. Birch Shipping Co. v. Republic of Tanzania, 507 F. Supp. 311 (D.D.C. 1980).

38. Liberian Eastern Timber Corp. v. Republic of Liberia, 659 F. Supp. 606, 610 (D.D.C. 1987).

In France a court has now held in a leading case that, although it is incumbent upon the courts to determine *ex judice* the commercial or sovereign nature of a transaction, the burden of proving the nexus between a commercial transaction and the property sought to be attached or executed upon remains the responsibility of the claimant.[39] In this case, the court was satisfied that the claimant had successfully adduced the necessary proof. Nevertheless, and as a general matter, this solution appears somewhat restrictive, since it may impose a very heavy burden upon the claimant. It may be extremely difficult for a private claimant to establish the use or intended use of a foreign State's property, particularly when this property consists of banking accounts, and to prevent the foreign State from switching its assets around in such a way as to confuse the situation and, in effect, to remove its property from the reach of its creditors. Against this, it can be argued that a foreign State needs protection against harassment and frivolous claims, the object of which may be less to reach the State's property than to force disclosure of the State's activities, including those of a noncommercial, and possibly sensitive, nature.

Faced with this dilemma, courts in various countries have reached different results. In Switzerland the Federal Tribunal has ruled that the burden of proof is on the State involved and that assets not specifically earmarked for sovereign activities are subject to attachment.[40] In the Federal Republic of Germany the Federal Constitutional Court, in a case concerning the garnishment of funds deposited in a German bank by the embassy of the Republic of The Philippines, held that to permit an investigation of the governmental or commercial use of the funds in question was not only impractical, but also inadmissible, since this might interfere with the embassy's public functions.[41] In the United Kingdom the House of Lords in the *Alcom* case[42] was satisfied to rely upon a certificate from the Ambassador of Colombia to the effect that funds deposited in the embassy's accounts in London were used only to meet expenditures incurred in the day-to-day running of the embassy, and were, therefore, beyond the reach of an alleged creditor.

39. Judgment of July 9, 1986, Court of Appeal, Versailles (in banc) (République Islamic d'Iran v. Société Eurodif), 2 ICSID REV.-FILJ 161 (1987). *See* G.R. Delaume, *supra* note 36.

40. Judgment of Feb. 10, 1960, T.F. (République Arabe Unie v. Dame X.), *reprinted in* 55 AM. J. INT'L L. 167 (1961), R.O. 86. I. 23. Note, however, that the liberal attitude of the Swiss courts regarding the issue of the burden of proof is tempered by the additional requirement that the transaction must bear a territorial nexus to Switzerland. *See supra* note 28 and accompanying text.

41. Judgment of Dec. 13, 1977, Federal Constitutional Court, (in the Matter of the Republic of the Philippines), 46 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 342 (1977). This decision contrasts with a more recent decision of the same court, Judgment of Apr. 12, 1983, (in the Matter of Constitutional Complaints of the National Iranian Oil Company), 64 BVerfGE 2 (1983), *translated in* 22 I.L.M. 1279 (1983).

42. Alcom Ltd. v. Republic of Colombia, 2 W.L.R. 750, 2 All E.R. 6 (H.L. 1984). For a critical appraisal of this decision, see Fox, *Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity*, 34 INT'L & COMP. L.Q. 115 (1985). In effect, the *Alcom* decision sanctions the same restrictive view as that set forth in the European Convention on State Immunity, *supra* note 1, art. 23 which denies execution against the property of a foreign State in the absence of an express waiver of immunity.

Clearly the matter is not closed. A solution to it has recently been adopted in the United States, but only in the context of measures of execution following recovery of an arbitral award judicially confirmed. As a result of the addition of a new subparagraph 6 to section 1610(a),[43] the nexus requirement no longer limits the remedies of the award creditor, and execution may be possible against all commercial assets of the award debtor. This new rule might be an incentive for lenders to select arbitration as a means of settling loan disputes.[44]

C. A Question of Timing

In order to be effective, execution must be swift and lenders may have a considerable interest in seeking prompt execution against the borrower's assets in the event of a default. However, it cannot be said that immunity rules are equally responsive to this consideration.

Thus, the FSIA eliminates for all practical purposes the earlier practice of pre-judgment attachment for the purpose of acquiring jurisdiction and maintaining a *quasi in rem* action against a foreign State. Pursuant to section 1610(c) and (d) no attachment can be made before rendition of judgment,[45] or, in the case of a default judgment, before a certain period of time after notice of the default is given to the defendant, without court permission. Post-judgment execution is possible against the assets of a foreign State, its political subdivisions, agencies or instrumentalities, subject to the qualification in regard to States and political subdivisions that the assets involved be used for the purposes of the transaction out of which the claim arises.[46] As to central banks, section 1611(b)(1) bars any measure of execution against their assets, whether prior to or after recovery of judgment, in the absence at least of a waiver of immunity.

Under the SIA, and after *Alcom*,[47] the property of a foreign State appears to be immune from pre-judgment attachment as well as post-judgment execution, unless that property is clearly earmarked by the State for use for commercial purposes, which, in effect, will require a waiver of immunity. A waiver of immunity will also be necessary to reach the assets of central banks, which, in the absence of such a waiver, are immune in all cases.[48] In contrast, the property of other "separate" entities would be exposed to both pre- and post-judgment measures of execution, no waiver being required.[49]

43. *See supra* note 2.

44. G.R. Delaume, *ICSID and the Transnational Financial Community,* 1 ICSID Rev.-FILJ 237 (1986).

45. The 1988 amendment of the FSIA does not affect these provisions and the prohibition, therefore, seems to apply also to pre-award attachment in the context of arbitration proceedings.

46. *See supra* note 35 and accompanying text.

47. *See supra* note 42.

48. State Immunity Act of 1978, *supra* note 3, § 14(4).

49. *Id.* § 14(1).

In this last respect, the SIA rule is similar to that which prevails in Continental countries in regard to the asset of autonomous public entities.[50] However, the rules in these countries differ from those of the SIA in that they do not differentiate between central banks and other entities and deny immunity to both, unless the bank or entity in question can establish that the property sought to be attached is used in connection with governmental activities performed by it on behalf of its own State.[51]

Insofar as foreign sovereigns are concerned, pre- and post-judgment measures of execution would appear possible in France, Germany, and Switzerland subject to the following qualifications: (i) in France, that there is a link between the commercial property subject to execution and the loan out of which the claim arises;[52] (ii) in Germany, that the commercial nature of the property involved is established beyond doubt,[53] and (iii) in Switzerland, that the loan bears a connection to the Swiss territory.[54]

II. Immunity Avoidance

In view of the diversity of immunity rules as well as of the uncertainties that arise from their judicial implementation or elaboration, it can be expected that lenders should not be satisfied with relying on those rules and should take advantage of the option, which they have, to stipulate express waivers of immunity in the loan documents.[55]

This expectation is justified. Because of the lack of uniformity of immunity rules and of the many situations that may require individual treatment, however, the scope and the specificity of waivers of immunity are subject to significant variations. Also, the effectiveness of such waivers may depend upon the precision of the drafting and upon judicial interpretation, which may create unexpected pitfalls for the immunity avoider.

A. Contractual Practice

Waivers of immunity vary in scope and complexity depending upon the degree of specificity of the immunity rules prevailing in the lenders' country. For example, in Switzerland loans are regarded as commercial transactions and execution can be levied against any assets of the borrower unless the borrower

50. *Id.* § 14(2); European Convention on State Immunity, *supra* note 1, art. 27(1). *See also* G.R. Delaume, *supra* note 1, ch. XII, ¶ 12.02 (Oct. 1986); G.R. Delaume, Law and Practice of Transnational Contracts ch. VIII, ¶ 8.05 (1988) [hereinafter G.R. Delaume, Law and Practice].

51. G.R. Delaume, Law and Practice, *supra* note 50.

52. *See supra* notes 36 & 39 and accompanying text.

53. *See supra* note 41 and accompanying text.

54. *See supra* note 28 and accompanying text.

55. For examples of waivers of immunity currently found in loan documents, see G.R. Delaume, *supra* note 1, ch. XI, ¶ 11.06, ch. XII, ¶ 12.05; Sandrock, *Prejudgment Attachments; Securing International Loans or Other Claims for Money*, 21 Int'l Law. 1 (1987).

establishes the public nature of such assets. All that may be required for a valid waiver is to provide, as Swiss lenders do, that the borrower waives its immunity "for the purposes of enforcing in Switzerland any judgment rendered by the Swiss court."

In contrast, in such countries as the United States, in which the precise meaning of immunity rules is to a significant extent left to judicial discretion, a waiver of immunity may need further refinement. For example, in view of the distinctions made in section 1610(a)(2) and (b)(2) of the FSIA as to the type of property subject to execution and the limitation upon pre-judgment attachment set forth in section 1610(c) and (d), it may be advisable to state expressly that the borrower waives its immunity "from attachment prior to entry of judgment and from attachment in aid of execution against any of its property and assets irrespective of their use or intended use."

This type of provision, which is in current use, clearly increases the remedies of lenders. Whether it would be effective in all cases and particularly in the case of execution against the assets of a foreign central bank is an interesting matter of speculation. It should be recalled that section 1611(b)(1) provides that the property of a central bank is immune from attachment and execution except to the extent that the bank or its "parent foreign government" has explicitly "waived its immunity from attachment in aid of execution or from execution."[56] Nothing is said in this provision as to waivers of immunity from attachment prior to entry of judgment and the view has been advanced that no such waiver would be possible.[57] This view appears too restrictive. The limitative language of section 1611(b)(1) can hardly have been intended to restrict party autonomy to the point of preventing a central bank, or for that matter its "parent foreign government," from agreeing to waivers of immunity that a foreign State is itself perfectly free to subscribe to insofar as its own property is concerned.[58] So far, this issue has not been clearly adjudicated. In *Banque Compafina v. Banco de Guatemala*[59] a Swiss banking corporation, holder of notes issued by instrumentalities of Guatemala and guaranteed by Banco, the central bank of Guatemala, sought to attach Banco's property in a number of New York banking institutions. Banco pleaded immunity, arguing that under section 1611(b)(1) it could not waive immunity from pre-judgment attachment. The corporation took the other view and argued that Banco had explicitly waived its immunity. The court held that it needed not decide the "difficult question"[60] of the proper construction of section 1611(b)(1), since the waiver of immunity in the notes guaranteed by

56. 28 U.S.C. § 1611(b)(1) (1982).

57. Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L L. 200, 209 (1979); Schreuer, *supra* note 9, at 65.

58. *See supra* note 2, § 1610(d); *see also* Patrikis, *Immunity of Central Bank Assets under U.S. Law*, in SOVEREIGN LENDING: MANAGING LEGAL RISK 98 (Gruson & Reisner eds. 1984).

59. 583 F. Supp. 320 (S.D.N.Y. 1984).

60. *Id.* at 323.

Banco related only to immunity from jurisdiction and did not cover matters of execution. In view of the language of the waiver, this construction was presumably unavoidable.

In the United Kingdom no particular problem exists since there is no doubt that central banks can waive their immunity. Following *Alcom,*[61] the situation is different in regard to the property of foreign States. To cope with *Alcom* waivers of immunity may have to be supplemented by an earmarking of funds expressly characterized as commercial assets to be used for loan service purposes. If this remark is correct, it would seem that *Alcom* may lead to a paradoxical situation. Unlike in earlier decades when lenders often insisted that loans made to foreign States be secured by pledges of assets or assignments of revenues, most contemporary loans are not so secured. *Alcom* may cause lenders to reconsider the situation.

So much the more, since in the absence of security, providing for waivers of immunity or execution in the lender's country might not yield full satisfaction. This consideration explains why lenders often seek to widen the scope of waiver of immunity in order to give them remedies not only in their home country but in other countries also. This type of provision, which is common, may raise complex issues.

Clearly the effectiveness of this type of waiver depends upon the immunity rules prevailing at the place of suit or of execution. Since in most legal systems, and in particular in the countries in which leading financial markets are located (which would be the logical places in which to bring suit or seek execution), waivers of immunity are given effect, immunity rules are not likely to present major obstacles to recovery. Yet, the fact cannot be ignored that some of these rules, such as the FSIA rule applicable to central banks, are still uncertain. This may be an encouragement to forum shopping.

So much the more, when account is taken of other rules relating not to immunity but to jurisdictional issues and, in particular, those concerning the recognition and enforcement of foreign judgments and arbitral awards. Thus, assuming that the lender has recovered judgment in his own country and seeks to enforce that judgment abroad, the lender may be confronted with problems such as proving the final character of the judgment, a lack of reciprocity, or adverse public policy. Problems of this kind may particularly arise in connection with the recognition and enforcement abroad of creditor judgments rendered in the United States. Unlike European countries, which are parties to an extensive network of multilateral and bilateral treaties providing for the mutual recognition and enforcement of judgments, the United States is not a party to any such treaty. Therefore, recognition and enforcement of American judgments in foreign countries depends upon foreign rules that may not be as liberal as those

61. *See supra* note 42 and accompanying text.

concerning the recognition and enforcement of foreign judgments in the United States.[62]

In contrast, the United States is a party of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[63] which is also in force in more than seventy countries, and to the ICSID Convention of 1965,[64] which has been signed by more than ninety States and ratified by ninety-one States. Both conventions greatly facilitate the recognition of arbitral awards. This is especially the case in regard to ICSID awards, since under the ICSID convention, there is no exception (not even on the ground of public policy) to the binding character of ICSID awards and to their recognition and enforcement in contracting States.[65]

B. The Effectiveness of Waivers of Immunity

In order to be fully effective a waiver of immunity should cover both immunity from suit and from execution. Consent to arbitration is often regarded as an implicit waiver of immunity, but since domestic courts do not always speak with a single voice on this issue, elementary prudence calls for the stipulation of an express waiver, and the same is a fortiori true in regard to immunity from execution.[66] In this connection, it should be recalled that if consent to arbitration under ICSID constitutes a waiver of immunity from suit, the ICSID Convention (article 55) does not purport to derogate to the immunity rules prevailing in contracting States.[67]

In addition to these basic considerations, it is also essential that waivers be precisely drafted and leave no room to argumentation. The following cases illustrate this remark. In *Libra Bank Ltd. v. Banco Nacional de Costa Rica*[68] promissory notes issued under a loan made to a bank wholly owned by the Government of Costa Rica provided that: "The Borrower hereby irrevocably and unconditionally waives any right or immunity from legal proceedings

62. For example, the prospectus relating to the Osterreichische Kontrollbank A.G. Guaranteed Notes due October 1, 1988, guaranteed by the Republic of Austria made it clear that: "It will not be possible to enforce in an Austrian court a judgment of a United States court."

63. 21 U.S.T. 2517, 330 U.N.T.S. 3, *reproduced in* G.R. Delaume, *supra* note 1, app. II, Booklet A, at 17 (Mar. 1988).

64. 17 U.S.T. 1270, 575 U.N.T.S. 159, *reproduced in* G.R. Delaume, *supra* note 1, app. II. Booklet B1, at 7 (Oct. 1985).

65. For the recognition of ICSID awards rendered against states see (i) in France: Judgment of June 26, 1981, Court of Appeal, Paris (S.A.R.L. Benvenutti [should read Benvenuti] and Bonfant v. Gouvernement de la République du Congo), 1981 Clunet 843, *translated in* 20 I.L.M. 878 (1981); (ii) in the United States: Liberian Eastern Timber Corp. v. Republic of Liberia, 659 F. Supp. 606 (D.D.C. 1987); Liberian Eastern Timber Corp. v. Republic of Liberia, 650 F. Supp. 73 (S.D.N.Y. 1986), *reprinted in* 26 I.L.M. 695 (1987), *aff'd mem.*, No. 86–9047 (2d Cir. May 19, 1987).

66. G.R. Delaume, *Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration*, 2 ICSID Rev.-FILJ 403 (1987).

67. *See* the Liberian cases cited *supra* note 65 that denied execution on FSIA grounds.

68. 676 F.2d 47 (2d Cir. 1982).

including suit judgment and execution on grounds of sovereignty which it or its property may now or hereafter enjoy."[69] Following a default in payment due to the imposition of exchange restrictions by Costa Rica,[70] the lenders attached the property of Banco Nacional in New York City. Banco moved to vacate the order of attachment on the ground that it had not waived its immunity from pre-judgment attachment because the waiver did not expressly refer to that type of attachment. The argument failed on the ground that the waiver evinced "a clear and unambiguous intent to waive all claims of immunity in all legal proceedings" and that it was "explicit" since "Banco Nacional certainly intended to reserve no rights of immunity in any legal proceedings."[71]

Proyecfin de Venezuela S.A. v. Banco Industrial de Venezuela S.A.[72] concerned a situation, which is not rare, in which a transaction is evidenced by interrelated documents. Proyecfin, a Venezuelan corporation, had borrowed funds from a consortium of Middle East banks to finance a housing project in Venezuela. The Banco Industrial de Venezuela (BIV), almost entirely owned by Venezuela, was party to the loan agreement, as guarantor of the loan. Concomitantly with the loan agreement, Proyecfin and BIV entered into a supervisory contract under which BIV undertook to act as a trustee for all monies received and disbursed for the project. This contract was made a condition of effectiveness of the loan agreement; it also provided that the provisons of the loan agreement were deemed to be incorporated by reference into the contract. In 1984, Proyecfin commenced an action against BIV, alleging several breaches of the contract. BIV raised several jurisdictional objections, including sovereign immunity.[73] This argument was dismissed on the ground that the loan agreement contained an express waiver of immunity and that, by incorporation, the waiver applied also to the supervisory contract.

69. *Id.* at 49.

70. As to this aspect of the case, see J. GOLD, *supra* note 19, at 435–38.

71. 676 F.2d at 49. Note that before the court of appeals rendered that decision, the district court had vacated the attachment and Banco Nacional had removed its assets from New York. After the decision of the court of appeals, the plaintiffs sought an order requiring Banco Nacional to return its assets. The order was denied on the ground that the plaintiffs could have sought a stay of the vacatur order pending the appeal or a restraining order preventing Banco Nacional from transferring its assets out of New York. This had not been done and the court refused to "issue an extraordinary writ to effect what plaintiffs could have done through ordinary means." Libra Bank Ltd. v. Banco Nacional de Costa Rica, 570 F. Supp. 870, 885 (S.D.N.Y. 1983).

72. 760 F.2d 390 (2d Cir. 1985).

73. Another objection was based on an alleged contradiction between the provisions of the Loan Agreement and of the Supervisory Contract. The Loan Agreement provided, alternatively, for the jurisdiction of the English, New York or Venezuelan courts. The contract contained an "election of domicile" in Venezuela. The court found that these provisions were not inconsistent and that the election of domicile was intended to deal only with a matter of venue in the event that suit was brought in Venezuela.

III. Conclusion

The gains made in recent years by the restrictive doctrine of immunity are significant. Progress is not uniform, however, and the practical implications of the doctrine, particularly in regard to matters of execution, are in a number of instances subject to doubt. Setbacks are also not excluded; the *Alcom* case illustrates the point.[74]

Under the circumstances, the practice of lenders to attempt to anticipate immunity issues by means of express waivers appears entirely justified. So much the more, since despite the diversity of immunity rules, there is one that has become clear: waivers of immunity, once agreed upon, cannot be unilaterally revoked by the borrower.[75]

Nevertheless, the effectiveness of waivers of immunity cannot be considered solely in the context of immunity rules. It depends also upon the capacity of the borrower to subscribe to such waivers and of the restrictions that may limit the borrower's ability to waive immunity or to submit to foreign courts, or to foreign or international arbitration. These are issues that should be carefully explored during the loan negotiations, since failure by the borrower to comply with the constitutional or other requirements of its own law might not only lead to controversies, but might put in jeopardy the expectations of the lenders.[76]

74. *See supra* note 42.

75. 28 U.S.C. § 1610(a)(1) (1982). This solution is also implicit in the European Convention on State Immunity, art. 23. *Compare* European Convention on State Immunity, art. 2 in regard to immunity from suit *with* the SIA, *supra* note 3, § 13(3).

76. Kahale, *State Loan Transactions: Foreign Law Restrictions on Waivers of Immunity and Submissions to Jurisdiction*, 37 BUS. LAW. 1549 (1982).